Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 1995

Louise Bass, Surviving Spouse of Kenneth Bass, Deceased, Maurice Bass and Christopher Bass,

Petitioners,

vs.

National Super Markets, Inc.,

Respondent.

Petition for Writ of Certiorari to
The Missouri Supreme Court

# PETITION FOR WRIT OF CERTIORARI

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60 pp

## QUESTIONS PRESENTED FOR REVIEW

This is a wrongful death case arising out of an incident on September 4, 1987, at a supermarket operated by National Supermarkets, Inc. ("Respondent" or "National"), in which Kenneth Bass, Plaintiffs' decedent ("Bass"), was shot and killed. Louise Bass, Maurice Bass and Christopher Bass, Bass' survivors ("Petitioners") submitted their case on the theory that Respondent negligently failed to provide adequate security to the store. Respondent asserted the affirmative defense that although Bass worked for another employer, he was Respondent's statutory employee under Section 287.040 R.S.Mo. 1994 of the Missouri Workers' Compensation law and that the work performed by Bass was part of Respondent's usual business and therefore, Petitioners did not have a civil cause of action against National as the statutory employer and that their only remedy against National was Workers' Compensation.

On August 20, 1993, after a two-week jury trial, the jury found in favor of Petitioners on their negligence claim and against Respondent on its statutory employee defense and returned a verdict in favor of Petitioners in the amount of $3,000,000.00. On November 24, 1993, the trial court granted Respondent's Motion for Judgment Notwithstanding the Verdict, setting aside the jury's verdict and entering judgment in favor of Respondent based on the statutory employee defense. The Court denied Respondent's Motion for New Trial. On March 7, 1995 the Missouri Court of Appeals reversed the trial court and reinstated the verdict in favor of Petitioners, ruling that it was a question of fact for the jury as to whether Bass was performing work which was part of Respondent's usual or ordinary business. The Missouri Supreme Court accepted the case for review and on November 21, 1995 affirmed the judgment of the trial court reversing the jury's verdict and entering judgment for Respondent. The Court adopted a new statutory employee test, ruling that Bass was Respondent's statutory employee as a matter of law. Petitioners' motion for rehearing was denied by the Missouri Supreme Court on December 19, 1995.

The questions thereby arising are:

1) Whether the Missouri Supreme Court may substitute its judgment and ignore evidentiary facts considered by the jury, contravening a conclusion reached by a jury, in violation of the United States Constitution's Seventh Amendment right to a jury trial and Fourteenth Amendment rights to procedural and substantive due process.

2) Whether the Missouri Supreme Court denied Fourteenth Amendment rights to substantive and procedural due process by applying its new statutory employee test to the case at bar and in not giving its decision prospective-only application to avert injustice or hardship; and whether the Missouri Supreme Court's opinion conflicts with and violates the holding of the United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 92, S.Ct. 349 (1971) because the Missouri Supreme Court's decision herein established a new principle of law by overruling clear past precedent; the purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation; and a balancing of the interests and hardships which would result from the imposition of the court's new rule would result in substantial hardship to Petitioners.

## LIST OF THE PARTIES

The parties to the proceeding before this court are:

| | |
|---|---|
| Petitioners: | Louise Bass, Surviving Spouse of KENNETH BASS, Deceased, Maurice Bass and Christopher Bass |
| Respondent: | National Super Markets, Inc. |

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**Petition for Writ of Certiorari to The Missouri Supreme Court**

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## PETITION FOR WRIT OF CERTIORARI

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The Petitioners, LOUISE BASS, MAURICE BASS and CHRISTOPHER BASS, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Missouri Court Supreme Court, entered in the above proceeding on November 21, 1995. Petitioner's Motion for Rehearing by the Missouri Supreme Court was denied on December 19, 1995.

## OPINIONS BELOW

The opinion of the Circuit Court of the City of St. Louis State of Missouri was entered on November 24, 1993 and is reprinted as Appendix F.

The opinion of the Missouri Court of Appeals, Eastern District was entered on March 7, 1995 and is reprinted as Appendix E.

The opinion of the Supreme Court of Missouri was entered on November 21, 1995 and is reprinted as Appendix D.

The order from the Supreme Court of Missouri denying Petitioners' Motion for Rehearing was entered on December 19, 1995 and is reprinted as Appendix A.

## JURISDICTION

This Petition seeks review of a decision of the highest court of the State of Missouri wherein Motion for Rehearing by the Supreme Court was denied on December 19, 1996. This application was submitted no later than 90 days from the aforesaid date.

Jurisdiction is substantially grounded upon Petitioners' claim of denial to a jury determination of the facts and therefore a denial of rights, privileges and immunities granted by the 7th and 14th Amendments to the United States Constitution.

Jurisdiction is invoked pursuant to 28 U.S.C. Section 1257 (a) in that this petition seeks review of a final judgment rendered by the highest court of a State.

## CONSTITUTIONAL PROVISIONS AND STATUTES

**Constitutional Provisions:**
U.S. Const. amend. VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. XIV, Section 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Statutes:**
28 U.S.C. Section 1257(a)

## STATEMENT OF THE CASE

This is a wrongful death case based upon negligent failure to provide adequate security. Louise Bass, Christopher Bass and Maurice Bass are Plaintiffs-Petitioners ("Petitioners"). National Supermarkets, Inc., is Defendant-Respondent ("Respondent" or "National"). Plaintiffs' wrongful death action arose out of an incident which occurred on September 4, 1987, at the National Supermarket located at 4331 Natural Bridge, St. Louis, Missouri ("Natural Bridge store"). Kenneth Bass, Plaintiffs' decedent ("Bass"), was shot and killed during a robbery there. At the time, Bass was employed by Building Butlers, Inc. ("BBI"), performing specialized polishing, buffing, waxing and stripping services at National's supermarket after the close of National's normal business.

Petitioners alleged in their Petition that National negligently failed to provide adequate security at its Natural Bridge store on the night Bass was shot and killed. At the time Bass was killed, National had hired Barrington Bryce Detective Agency Inc. to provide security for the Natural Bridge store. Two guards were employed at the store until closing at 10:00 p.m. Between 10:00 p.m. and 11:00 p.m., only one guard secured the store. The store had closed circuit television cameras to watch for shoplifting inside the store. However, the store did not have closed circuit television cameras to monitor the entrances or exits to the store after closing. The store was not equipped with a panic alarm system. The store safe was equipped with a silent alarm but it was not turned on at the time of Bass' death.

National's usual security procedure was to have all employees leave at the same time once all the customers left and the store finally closed. At the time, the procedure called for the silent alarm to be set, which would be triggered within a matter of minutes if the store doors were not locked behind the employees.

On the night in question, National deviated from this procedure. A stock boy, Michael Marr, was ready to leave a few minutes earlier than the rest of the other employees. Store manager, Harold Meyer, requested security guard, David Spahn, to unlock the doors to let out the stock boy. When the doors were unlocked, the assailants gained entrance to the store, robbed the store and shot and killed several of the people inside the store, including Bass. The St. Louis Medical Examiner determined that Bass died of a gunshot wound to the head.

National sought to avoid liability by raising the affirmative defense that Bass was its statutory employee pursuant to Section 287.040 R.S.Mo., 1994. National claimed that under the Missouri Workers' Compensation statute, Bass should be considered its employee "in law" even though Bass was not National's employee "in fact" and that applying Section 287.040

R.S.Mo., 1994, Bass' survivors were limited to asserting a workers' compensation claim against National, even though they had already settled their claim with Building Butlers, Inc. If Bass were National's statutory employee, Plaintiffs could not assert a civil cause of action against National. National asserted that Bass was performing work which was part of its usual business, under contract and on its premises. Petitioners denied that Bass was a statutory employee or National or that buffing, polishing waxing and stripping floors was part of National's usual or ordinary business.

Kenneth Bass had been working for BBI for approximately two weeks. He had been performing stripping services for BBI at the Jewish Community Center. Bass had worked approximately three nights at National. He was transferred to the National store to help complete the stripping job there. National employees did not lay finish or wax the floors. National employees never stripped the floors. National conceded that it did not do stripping work at any of its stores. Furthermore, according to Louise Bass, her husband informed her that he would be stripping the floor at the National store on the night of his death.

The jury determined the negligence issue and statutory employee defense in favor of Petitioners and against Respondent, returning a verdict for Petitioners in the sum of Three Million Dollars ($3,000,00.00). On November 24, 1993, the trial court granted Respondent's Motion for Judgment Notwithstanding the Verdict on the issue of the statutory employee defense and entered judgment in favor Respondent. The Court denied Respondent's Motion for New Trial.

The Missouri Eastern District Court of Appeals issued its opinion on March 7, 1995 reversing the trial court and remanding the case with instructions to enter judgment in favor of Petitioners in accordance with the jury verdict. The Eastern District found that the statutory employee issue was question of fact properly decided by the jury. The Missouri Court of Appeals viewed the

evidence in the light most favorable to Petitioners and determined:

> "Here, there was substantial evidence that decedent performed the specialized work of scrubbing and buffing the floor, and of stripping and waxing it. When he scrubbed and buffed the floor, he used a propane-powered buffer owned, not by National, but by BBI. National employees at the store did not use, any were not trained to use, the buffer. Decedent did not work in conjunction with National's own employees when he scrubbed and buffed the floor; and National employees did not perform these same functions. Compare McGuire, 756 S.W.2d at 533 (temporary worker hired as "sorter" was a statutory employee where other "sorters" worked at the plant and performed the identical task of sweeping the floor as one of their duties). Decedent worked during the night when the store was closed to the public, so that his work would not interfere with the day-to-day operation of the store. See Wooten, 312 S.W.2d at 3. He did not perform routine, general cleaning, the type of cleaning performed by National employees during the day. His job specifically included scrubbing and buffing the floor, utilizing a particular program of floor care with several defined steps. It is inconclusive that at the time he was killed he may have been merely sweeping the floor, because that was a requisite step in the PEP program of floor care.
>
> In addition, there was evidence that decedent was stripping the floor at the store on the night of his death. The process of stripping required special chemicals and utilized the machinery in a particular fashion. Stripping was done only periodically. Stripping was therefore a specialized job, not routinely performed by National's in-house employees.
>
> From these facts and the inferences therefrom, a

> jury reasonably could conclude that the nature of decedent's duties did not warrant his characterization as a statutory employee. The trial court improperly granted judgment n.o.v. in favor of National. Plaintiffs' point on appeal is granted." Slip Opinion E.D. No. 65169 at PP. 8-9.

Thereafter, the Supreme Court accepted National's application for transfer. On November 21, 1995 The Missouri Supreme Court affirmed the judgment of the trial court and ruled that decedent was National's statutory employee as a matter of law.

The Missouri Supreme Court in its opinion, announced a new Missouri test to be applied when deciding the putative statutory employer's "usual business". Bass et al., v. National Super Markets, Inc., Slip Op. 77915 (Decided November 21, 1995). According to the Court's holding, the putative employer's "usual business" is defined as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement. Bass, Slip Opinion at 9.

The Court took judicial notice of the regulations of the Department of Health which requires that the "cleaning of floors, walls and ceilings shall be done as often as is necessary." 19 CSR 20-1.020(23) (1992). Bass at 10. The Court then concluded that the stripping and waxing of National's floors was required by the Department of Health Regulations thereby making the work Bass was performing at the time of his death within the usual course of National's business.

This conclusion ignored the evidence considered by the jury and cited in the Court of Appeal's opinion concerning the work duties of Bass, thereby depriving Petitioners' of the right to

a jury determination of this question of fact.

The Department of Health merely requires the cleaning of floors. It does not require that the floors be stripped or kept in highly glossed and polished condition. The work performed by Bass was not required by the Department of Health and therefore, the Court erroneously concluded that the work performed by Bass was within National's usual course of business.

The Missouri Supreme Court has defined the appropriate standard of review of the statutory employee defense in Walton v. United States Steel Corp., 362 S.W.2d 617, 621 (Mo. 1962). It stated that a court should never withdraw a question from the jury, unless all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the facts that condition the issue.

The Missouri Supreme Court in the instant case ignored the facts considered by the jury and the Court of Appeals in the case at bar. Even under the Court's newly announced guidelines on the definition of "usual course of business" Bass was not performing work within the usual course of National's business and, therefore, Bass was not the statutory employee of National. It was a question of fact for the jury as to whether stripping and waxing was part of the usual business of National.

As the facts cited in the Court of Appeals opinion indicate, Petitioners presented sufficient evidence in the eyes of the jury for it to render a verdict in favor of Petitioners. The Missouri Supreme Court through its holding has violated the Seventh and Fourteenth Amendments to the United States Constitution by substituting its judgment for the jury's finding and ignoring facts considered by the jury, thereby depriving Petitioners of their right to a jury determination and procedural and substantive due process as guaranteed under the United States Constitution.

The Missouri Supreme Court further deprived Petitioners

of their United States Constitutional rights by not giving its decision prospective-only application to avert injustice or hardship under the United States Supreme Court's analysis in Chevron Oil Co. v. Huson, 404 U.S. 97, 92, S.Ct. 349 (1971) because the Missouri Supreme Court's decision herein established a new principle of law by overruling clear past precedent.

Following the adverse opinion of the Missouri Supreme Court, Petitioners filed their Motion for Rehearing asserting that the court's opinion deprived them of their constitutional right to a jury trial and procedural and substantive due process as guaranteed by the United States Constitution. Petitioners' Motion for Rehearing was denied by the Missouri Supreme Court on December 19, 1995.

Petitioners now submit their petition for writ of certiorari to the United States Supreme Court for proper review of their case.

## REASONS FOR GRANTING THE WRIT

### I. THE UNITED STATES SUPREME COURT IS VIGILANT TO EXERCISE ITS POWER OF REVIEW IN ANY CASE WHERE IT APPEARS THAT THE LITIGANTS HAVE BEEN IMPROPERLY DEPRIVED OF THEIR RIGHT TO A JURY DETERMINATION AND SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

In the present case, the Missouri Supreme Court has effectively eliminated the traditional role of a jury in any case involving injury to an employee who performs work on the premises of one who is not his employer "in fact." The court has unjustly failed to uphold a jury verdict supported by sufficient factual evidence and ignored evidence considered by the jury and cited in the appellate court's opinion. In addition, the court has without proper discretion replaced its judgment for that of the jury's, denying Petitioners' constitutional rights to a jury trial and

substantive and procedural due process.

The Missouri Supreme Court defined the standard of review of the statutory employee defense in Walton v. United States Steel Corp., 362 S.W.2d 617, 621 (Mo. 1962) when it stated:

> **The defense that plaintiff was a statutory employee and hence could not maintain an action at common law is an affirmative one and the burden of pleading and proving that defense rests upon the defendant.** [Citation omitted]
>
> **[A] court should never withdraw a question from the jury, unless 'all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the facts that condition the issue.**
>
> **Where there is uncertainty arising "from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."** [Citation omitted]. **Also, in the ruling the question we will view the evidence in the light most favorable to plaintiff and will disregard defendant's evidence unless it aids plaintiff.** Id. at 621. [See also Sippel v. Custom Craft Tile, Inc., 480 S.W.2d 87 (Mo.App. 1972)].

In Sheffield Steel Corp. v. Vance, 236 F.2d 928, 931-32 (8th Cir. 1956), deciding whether plaintiff was a statutory employee, the Court affirmed plaintiff's judgment and stated:

> **Unless no room for reasonable difference in a judgment exists, the question is**

> **primarily one for appraisal and resolution by the trier of the facts upon all the elements of the situation presented.** Id. at 932.

In the instant case, it is apparent that the Missouri Supreme Court violated the standard of review and considered National's evidence concerning rules and regulations regarding the cleaning of supermarkets. Even considering this evidence, all reasonable minds could not conclude that Bass' performance of specialized polishing, buffing, waxing and stripping was essential to complying with the laws or was part of the usual business of National.

In reviewing a lower court's ruling on a Respondent's motion for judgment notwithstanding the verdict the reviewing court is not free to weigh the evidence, pass on the credibility of witnesses or substitute its judgment for that of the jury. Ybarra v. Burlington Northern, Inc. 689 F.2d 147, 150 (8th Cir. 1982).

By its consideration of Respondent's evidence, the Missouri Supreme Court essentially reweighed the evidence, drew inferences and substituted its judgment for that reached by the jury. In its consideration of this evidence, the court has failed to properly follow its own standard of review and thus has deprived Petitioners of their constitutional right to a jury trial and substantive and procedural due process.

Through its holding the Missouri Supreme Court has usurped a role Constitutionally granted to the jury and has substituted its own judgment for that of the jury's. As facts cited in the Missouri Court of Appeals' opinion indicate, Petitioners presented sufficient evidence for the jury to render a verdict in favor of Petitioners on the statutory employee defense. The Missouri Supreme Court through its holding and ignoring of the evidence considered by the jury and the Missouri Court of Appeals has grossly failed to effectuate the intent of the Seventh and Fourteenth Amendments to the United States Constitution. The Missouri Supreme Court has denied Petitioners their right to

a jury determination and their right to substantive and procedural due process.

**II. THE MISSOURI SUPREME COURT SHOULD HAVE GIVEN ITS DECISION PROSPECTIVE-ONLY APPLICATION TO AVERT INJUSTICE, HARDSHIP OR THE DENIAL OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS; AND IT OPINION IS IN CONFLICT WITH THIS COURT'S THREE-FACTOR TEST ANNOUNCED IN CHEVRON OIL CO. V. HUSON BECAUSE:**

**A. THE DECISION HEREIN ESTABLISHED A NEW PRINCIPLE OF LAW BY OVERRULING CLEAR PAST PRECEDENT;**

**B. THE PURPOSE AND EFFECT OF THE NEWLY ANNOUNCED RULE WILL NOT BE SIGNIFICANTLY ENHANCED OR RETARDED BY RETROSPECTIVE OPERATION; AND**

**C. A BALANCING OF THE INTERESTS AND HARDSHIPS WHICH WOULD RESULT FROM THE IMPOSITION OF THE COURT'S NEW RULE WOULD RESULT IN SUBSTANTIAL HARDSHIP TO PETITIONERS.**

The United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 92, S.Ct. 349 (1971) and the Missouri Supreme Court in Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. banc 1985) clarified the principle that a court may constitutionally issue prospective-only application of its decision in order to avert injustice or hardship. A decision may be given prospective-only application if the court's decision establishes a new principle of law by overruling clear past precedent and if the purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation. The court must also balance the interests and hardships of the

parties who would be affected by the decision. Sumners at 724.

In the instant case, the first prong of the test is clearly established because the Missouri Supreme Court's decision overruled its decision of Wooten Youthcraft Mfg. Co. 312 S.W.2d 1 (Mo. 1958). The Missouri Supreme Court announced a new Missouri test to be applied when deciding the putative statutory employer's "usual business". Bass et al., v. National Super Markets, Inc., Slip Op. 77915 (Decided November 21, 1995). According to the Court's holding, the putative employer's "usual business" is defined as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement. Bass, Slip Opinion at 9.

This new test conflicts with its earlier holding in Wooten. In Wooten, the plaintiff was employed by a cleaning company that contracted to perform janitorial services on defendant's premises after the store closed for business. The Wooten case, on facts quite similar to the facts of the instant case, held that a janitorial employee was not performing work within the usual course of the putative statutory employer. The janitorial work in Wooten was performed after hours because the janitorial services would have interfered with defendant's usual work of manufacturing women's clothing. The defendant alleged that the janitorial services provided by plaintiff were an essential part of its business because it could not conduct its manufacturing business unless the premises were kept clean. The Supreme Court in Wooten addressed defendant's contention by comparing the services provided by janitorial firms with those provided by lighting system firms. The court stated that defendant's business could not be conducted without light, yet the lighting systems employees would not be statutory employees.

The second prong of the test requires the Court to consid-

er whether the newly announced rule will be enhanced or retarded by retrospective operation. Realistically, it is doubtful that there are any pending cases in which the employee will be benefited by the Court's ruling herein. This part of the three-part test announced in Sumner should not be determinative of the issue.

The balancing of the equities, as required by the third prong of the test clearly favors Petitioners. Huff v. Union Electric, 598 S.W.2d 503 (Mo. App. 1980) properly states the reality that in modern society, the employee is the one who is likely to suffer hardship by the retroactive restriction of common law liability by extension of the statutory employment designation.

Petitioners relied on prior court rulings in the area of statutory employment. Petitioners received a substantial verdict against a wrongful death tortfeasor. Worker's compensation benefits were provided by Bass's actual employer, BBI. Accordingly, no benefit extends to Petitioners as a result of the Court's ruling herein. The only beneficiary is a wrongful death tortfeasor. On the other hand, considerable hardship is suffered by Petitioners not only by the denial of a substantial verdict, but also by the obligations of substantial litigation costs and expenses. As pointed out in Huff, the primary beneficiaries of the Court's new rule will be common law tortfeasors. The application to the case at bar of the Supreme Court's new test for statutory employment is a denial of substantive and procedural due process as required by the United States Constitution. Therefore, the Court's decision should be applied only prospectively.

## CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant their Petition for Writ of Certiorari and reverse the decision of the Missouri Supreme Court.

Respectfully submitted,

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